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Case No. _____

United States Supreme Court

OCTOBER 1987 TERM

E & S DESIGN AND
DEVELOPMENT, LTD. and
HAWTAL WHITING, S.A.,
Petitioners,

vs.

JAMES MONTGOMERY,
District Director,
United States
Department of
Justice, Immigration
and Naturalization
Service,
Respondent.

_____/

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the rule of *Chevron, U.S.A., Inc.* v *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires deference to an agency's construction of a statute which is ambiguous, apply when (a) the statute is unambiguous, (b) the legislative history surrounding the adoption of the statute is unambiguous, (c) the agency itself took the position in pleadings filed with the Sixth Circuit Court of Appeals that the statute was unambiguous and (d) the agency itself has taken diametrically opposing positions about the meaning of the statute?

2. What is the meaning of the Immigration and Nationality Act of 1952, 8 USC 1101(a)(15)(H)(ii), a statutory scheme which defines the circumstances under which qualified aliens with special expertise and skill critical to the American economy will be permitted to enter the United States to perform temporary services—a question of first impression for this Court?

LIST OF PARTIES TO THE PROCEEDING

E & S Design and Development, Ltd.

Hawtal Whiting, S.A.

James Montgomery, District Director,
United States Department of Justice,
Immigration and Naturalization Service

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Opinion in *E & S Design & Development, Ltd. et al* v *James Montgomery*, United States Sixth Circuit Court of Appeals Nos. 86-1550/2054, 825 F. 2d 1084, August 11, 1987

Order Denying Motion for Rehearing in *E & S Design & Development, Ltd. et al* v *James Montgomery*, United States Sixth Circuit Court of Appeals Nos. 86-1550/2054, September 25, 1987

CONCISE STATEMENT OF GROUNDS ON WHICH THE COURT'S JURISDICTION IS INVOKED

On August 11, 1987, the United States Sixth Circuit Court of Appeals rendered the opinion from which this petition for certiorari stems. On September 25, 1987, the United States Sixth Circuit Court of Appeals denied petitioners' timely filed petition for rehearing.

Petitioners believe that this Court has jurisdiction to review the Sixth Circuit's judgment in question by writ of certiorari because this appeal implicates questions related both to the ability of a court to purport to defer to the agency interpretation of an "ambiguous" statute where the statute is clear and the agency itself contends that the statute is clear, and the meaning and interpretation of 8 USC 1101(a)(15)(H)(ii).

STATUTES IN ISSUE

8 U.S.C. 1101(a)(15)(H) prescribes:

The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens . . . an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability, and who, in the case of a graduate of a medical school coming to the United States to perform services as a member of the medical profession, is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency; or (ii) who is coming temporarily to the United States to perform temporary service or labor, if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) who is coming temporarily to the United States as a trainee other than to receive graduate medical education or training; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him[.]

CONCISE STATEMENT OF THE CASE

1. *Nature Of The Case.*

This case involves a question about the INS district director's interpretation and administration of section 101(a)(15)(H)(ii) the Immigration and Nationality Act of 1952, as amended (the Act), which governs the importation of temporary alien workers as nonimmigrants, upon petition of the importing employer.

2. *Course of Proceedings And Disposition Below.*

On September 30, 1985, petitioners E & S Design & Development, Ltd., and Hawtal Whiting, S.A., sister foreign corporations, brought an action against the INS district director for a declaratory judgment and other relief. Petitioners alleged that the district director had improperly denied E & S Design's petitions by which it had sought to admit temporary foreign workers into the United States on "H-2" visas under section 101(a)(15)(H)(ii) of the Act for the purpose of fulfilling a contract to provide automotive design services to General Motors at its Technical Center in Warren, Michigan, and other places. Petitioners alleged that respondent's action was premised on the notion, contrary to the statute and regulations, that if an employing petitioner has an "ongoing need" for the services for which it seeks to process petitions for H-2 visas, it cannot, as a matter of law, satisfy the requirement that the foreign nationals will be performing temporary services.

On November 15, 1985, the district court heard argument on the parties' cross motions for summary judgment. On April 15, 1986, the court denied respondent's motion and granted petitioners' motion. In its opinion, the court found that General Motors has employed non-domestic workers to perform engineering design services since 1978, that its need for these services is cyclical (occurring from one model year to the next), and that the Labor Department has certified that there is a shortage of workers to perform such services. The court concluded that even though petitioners fell short of satisfying

the "temporary" need aspect of the standard set forth in *Matter of Artee Corporation*, 18 I&N Dec. 366 (Comm. 1982), which was used by the respondent in denying the H-2 petitions, the latter had nevertheless acted arbitrarily in denying them.

First, the court found that respondent had offered no explanation for granting H-2 permits on behalf of five design engineers while denying 91. Second, it found that respondent had curiously suggested in its brief that the petitions might have been granted had General Motors been the petitioning party rather than petitioners. The court held that regardless of whether the party seeking approval of the visas is the domestic company in need of the services or a foreign corporation whose employees stand ready to perform such services, the consideration given the applications is necessarily the same. Third, the court found that the Department of Labor had certified that there was a shortage of domestic workers available to perform the design services and that this is the type of deficiency H-2 visas are intended to correct.

In its judgment issued April 15, 1986, the court remanded the cause of action to the respondent for "the granting of the visa applications."

On June 13, 1986, respondent filed a notice of appeal from the court's judgment.

On July 14, 1986, petitioners moved the district court to enforce the judgment, contending that respondent had refused to issue the twelve-month visas which the court had ordered be granted. In an order issued on September 2, 1986, the court granted the motion. The court stated that its April 15, 1986 order was not ambiguous, that respondent had been directed to grant the 91 12-month visas for which petitioners applied, and that the 12 months began to run on the date of the court's order and not on the date of application for the petitions. The court therefore ordered respondent to grant the visas for the length of time specified in the application.

On November 3, 1986, respondent timely filed a notice of appeal from the court's September 2, 1986 order.

On August 11, 1987, the Sixth Circuit Court of Appeals reversed the district court's orders. It found that respondent's interpretation of the statute was "plausible" and that, therefore, it was required to defer to that interpretation under the holding of *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). It also concluded that respondent had not acted arbitrarily in granting some applications and refusing others.

Petitioners timely filed a petition for rehearing. On September 2, 1987, the Sixth Circuit Court of Appeals stayed issuance of the mandate pending application for a writ of certiorari. Petitioners' application for rehearing was denied on September 25, 1987.

3. *Concise Statement of Facts.*

The facts relevant to this petition are not in dispute. Petitioners are foreign corporations, specializing in automotive engineering. Petitioners' engineers perform automotive engineering and design services for several internationally-known corporations, among them General Motors Corporation (GM), British-Leyland, Jaguar, Rolls-Royce and Freight Rover.

Petitioners themselves do not produce their own line of automobiles. They do have their own staffs of engineers. On a contractual basis, petitioners' employees engineer solutions to problems encountered by automotive companies such as Ford and GM. Some of petitioners' engineers work full time at the main offices in Pitsea, Essex, England. On occasion, petitioners' engineers are sent to work at the plants or offices of the company with which petitioners have contracted. Even while working out of the main offices, or, for that matter, out of Great Britain, petitioners' engineers remain petitioners' employees, and typically return again to work at the Pitsea offices after working in a foreign country.

Recently, more of petitioners' employees have had occasion to work in the United States on a temporary basis. This is

true for several reasons. There is a shortage of United States engineers of the type needed to perform the services in question. Petitioners' engineers are typically design draftsmen. A four-year engineering degree from a United States university would ordinarily overqualify a candidate for a design draftsman position. Training programs and associate degree curricula at community colleges are now being established to provide American workers with the training and background necessary to qualify for the position, but there will be a shortage for some time. In addition—as the Court can take judicial notice—the automotive industry is now at peak, albeit temporary, levels of production because the economy has rebounded; because there is substantial—in some cases record—demand for automobiles; and because the automobile companies are busily engaged in planning for future years.

As noted, petitioners sometimes send their engineers to work with the client corporation. In the case of GM, petitioners have, in the past, sent engineers to work at the GM Technical Center in Warren, Michigan. Until just before the lawsuit commenced, petitioners were able to perform contractual obligations with GM by securing for its engineers "H-2" permits pursuant to 8 U.S.C. 1101(a)(15)(H)(ii) *et seq.* H-2 permits, as detailed below, permit a foreign national to enter the United States for a limited time, to perform temporary services; these permits, once issued, may be extended for a limited time. Petitioners have received numerous H-2 permits in the past, which permitted the companies to perform contractual obligations with GM.

In 1985, petitioner E & S sought 91 permits, and respondent refused to issue the permits. The denials followed this sequence of events:

Beginning in February, 1985, pursuant to 8 CFR 214.2(h)(3)(i) and 20 CFR 621, E & S filed applications for temporary labor certification with the Michigan Employment Security Commission for automotive designers who were to perform design services, such as designing interior trim, seating, underframes

and doors, for a variety of projects, including the 1989 General Motors Corporation Eighty Program. These applications were forwarded to the Regional Office of the Department of Labor for a determination. The Department of Labor has a statutory responsibility to certify that there is a *bona fide* shortage of available American labor to perform the requisite tasks—and, in every one of the ninety-one cases, the Department did so, concluding that "[q]ualified workers [could not] be founded in the United States[, and that] [e]mployment service policies [had] been observed."

Beginning in March, 1985, in accordance with Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act, 8 U.S.C.1101(a)(15)(H)(ii), E & S filed petitions to Classify Nonimmigrant as Temporary Worker or Trainee on form I-129B, as well as some applications to extend time of temporary stay (form I-539), permitted by statute, on behalf of some of the employees who had already entered and were working in the United States. Respondent denied all 91 petitions. On the same day that respondent denied some of the H-2 visas in question, respondent approved five other H-2 petitions for the same petitioner, E & S, for automotive designers engaged to perform identical automotive design services for an identical project to be performed for GM, Fisher Body, in Warren, Michigan. E & S appealed the denials; and, on September 12, 1985, the Administrative Appeals Unit of respondent dismissed the appeals.

ARGUMENT

This Court should grant petitioners' application for a writ of *certiorari* to vindicate the important principle that a court is not entitled to defer to agency construction of a statute where the statute is unambiguous. Here, respondent *concedes* that the statute is unambiguous. But, notwithstanding that concession, the respondent has, over the years, taken diametrically opposite positions on the meaning of the statute it must enforce. Since the agency *says* the statute is clear, some-

thing is seriously amiss: the agency seems to have decided nothing more than that it does not want aliens in the United States any more.

Specifically:

1. The linchpin of the United States Sixth Circuit Court of Appeals August 11, 1987 opinion and order reversing the summary judgment of the District Court which had required respondent to issue H-2 visas to 91 workers hired by petitioners, was that the interpretation of the statute which petitioner utilized to deny the H-2 visas in question was "plausible." (Opinion and Order, August 11, 1987, p 10.) The Court acknowledged that respondent's contrary interpretation of the relevant statute in question—an interpretation which respondent had adopted for years and which, petitioners contend, would have required issuance of the permits—was also "plausible." (Opinion and Order, p 10) Under those circumstances, the Court held that it was required to defer to the statutory construction of appellant, which was charged with the statute's administration. (Opinion and Order, p 11) In support of that proposition, the Court cited *Chevron, USA., Inc* v *Natural Resources Defense Council, Inc*, 467 US 837, 842-43 (1984). (Opinion and Order, p 11)

2. The fundamental flaw of the Sixth Circuit's Court's reliance on *Chevron* is that the *Chevron* rule applies only where the statute is ambiguous, or where the legislative scheme itself contemplates that the administrative agency will necessarily have flexibility in interpreting, promulgating and applying rules of decision. Thus, the *Chevron* Court explained:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. *If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress*. If, however, the court determines Congress has not

> directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [*Chevron, supra*, 467 US at 842-843 (emphasis supplied)]

3. In this case, Congress' legislative intention in promulgating 8 USC §1101(a)(15)(H)(ii) could hardly be more clear.

The starting point for this Court's analysis of whether Hawtal's petitions should have been granted is, of course, the statute itself. 8 USC §1101(a)(15)(H)(ii) prescribes that visas may be provided to an alien who is

> coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country[.]

Section 1101(a)(15)(H)(ii) thus imposes three distinct requirements on a foreign national seeking to obtain an H-2 visa: (1) the foreign national must be coming temporarily to the United States; (2) he must be coming to perform temporary services or labor; and (3) there must not be American workers who are able to perform the services or labor which he is performing.

The text of the statute is thus very clear; and this Court's function, in the first instance, is to examine the plain text of the statute to determine its meaning. *See United States* v *Apflebaum*, 445 US 115, 121 (1980) ("[i]t is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language"); *United States* v *Turkette*, 452 US 576, 580 (1981) ("[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'" [citation omitted].

The legislative history of the Act confirms that the plain text of the statute means precisely what it says:

> The question of importing any alien as a non-immigrant in this class is to be determined by the Attorney General as prescribed in Section 214(c) which sets forth the petition procedure. These provisions of the bill grant the Attorney General sufficient authority to admit temporarily certain alien workers, industrial, agricultural, or otherwise, *for the purpose of alleviating labor shortages* as *they exist or may develop* in certain areas or certain branches of American productive enterprises, *particularly* in *periods of intensified production*. They also enable foreign trainees to acquire the knowledge of American industrial agricultural, and business methods. [H Rep 1365, 82nd Cong, 2d Sess 44-45 (1952) (emphasis supplied)]

Petitioners have satisfied each of the statutory requirements. It is undisputed that the foreign nationals who work for petitioners are in the United States on a temporary basis; they perform their work and services, and then they leave. It is also undisputed that the petitioners personnel are performing temporary services. The engineers are assigned to specific, discrete projects. GM and other suppliers, on a need basis, orally notifies petitioners of its need for temporary services; and petitioners fill that need for a price. The services which are performed are temporary in nature; petitioners personnel are used by GM on an as-needed basis during periods of peak production to accommodate shortages and to work on specific projects, like the GM Eighty Program; and these engineers return to the United Kingdom after their services are completed.

The legislative history relating specifically to 8 USC §1153(a)(6), another section of the Immigration and Nationality Act, also confirms that the statute's reference to "temporary" means precisely what it says. 8 USC §1153(a)(6) refers to immigration quotas for labor "not of a temporary or seasonal nature." The following colloquy about the meaning of "temporary or seasonal" occurred in the hearings before the

house subcommittee on HR2580 to amend the Immigration and Nationality Act:

> Mr. Miklejohn [spokesperson for the AFL-CIO]: We say the jobs must be permanent in nature.
>
> Mr. Moore [congressman]: Yes.
>
> Mr. Biemiller [spokesman for the AFL-CIO]: I think possibly we can clarify this, Congressman, by pointing out that what we are talking about, and I am just using an arbitrary skill at the moment, is this: If we are to admit 100 tailors we ought to be sure that there is a shortage of 100 tailors on a permanent basis and not that this is a shortage for 6 months of 100 tailors.
>
> Mr. Moore: I would certainly agree with that. [House Subcommittee Hearings, 89th Congress, 1st Session 5 (1965) at 327 (emphasis supplied)]

The issue, starkly posed, is whether there is a temporary shortage of personnel available to do the job; i.e., whether "temporary" services, rather than permanent services, are to be performed. Since the services were temporary and job-specific and related to short-term shortages in the available supply of skilled automotive body designers, it is clear that each of the E&S foreign nationals whose petition was denied satisfied each of the criteria articulated by the statute. *Accord*, *Rogers* v *Larson*, 563 F2d 617, 624 (3d Cir, 1977) ("[p]rior to the enactment of the INA, the controls over the non-immigrant alien workers who have been admitted to the Virgin Islands under special circumstances, as well as over aliens working illegally, were slight . . . In the early years after the INA became effective, the Immigration Service construed the H-2 provision as requiring that the employment be very temporary. The hotel and agricultural jobs were considered to be recurring and seasonal in nature and they were not included within the interpretation. Employers in those fields, who had previously relied heavily on non-resident alien workers, began to complain of shortages of help . . . in 1954 a special House subcommittee held hearings and studied this problem. Con-

cluding that the Services interpretation of the word 'temporary' was too restrictive, the subcommittee recommended a more realistic and expeditious application of the H-2 provision for natives of the Island of Tortola in the British Virgin Islands.")

Petitioners acknowledge the existence of *Matter of Artee Corp*, 18 I & N Dec. 366 (Comm. 1982), a decision made by the immigration and naturalization commissioner. *Artee* is not controlling, however, for several reasons: (1) respondent's interpretation of the relevant statutory language in *Artee* is plainly at odds with the text and the legislative history of the statute; and (2) the *Artee* decision itself reversed an earlier interpretation by respondent, *Matter of Contopoulos*, 10 I & N Dec. 654, 657 (Acting RC, 1964), which set forth respondent's *contrary* position for almost twenty years. Indeed, it is respondent's sudden shift of position from the position espoused in *Contopoulos* to that espoused in *Artee* which makes respondent's position so perverse, and the Sixth Circuit's deference to respondent so inexplicable.

Artee involved a case in which a machine shop provided temporary help to technically oriented firms. The petitioner machine shop contended that since the persons whom it supplied to the technically oriented firms were supplied on a temporary basis, the foreign nationals in question met the requirement of the statute that the foreign nationals engage in "temporary services." The commissioner decided that

> [t]he test of the true nature of the temporary need for the position lies in examination of the temporary need of the temporary help service, not its customers . . . There is currently a wide-spread shortage of skilled machinists in the United States. Because of this shortage, the petitioner, as a prudent business measure, has ensured that it can supply machinists to its customers. Its need to supply machinists to its customers is ongoing. Therefore, as long as this universal shortage of machinists exists, the nature of the need for the position with the petitioner is such that the duties are not temporary and will persist as

long as the shortage. [Id at 368]

Thus, the commissioner concluded that if the petitioner actually supplying the services had an ongoing need for machinists, the petitions would have to be denied.

Artee flies directly in the face of the text and legislative history of the statute. There is absolutely nothing in the statute which imposes any kind of an "ongoing need" criterion whatsoever, or that relates the grant or denial of the petitions to the *petitioner's* need. To the contrary, the issue is merely whether nationals in this country are in this country temporarily, which is undisputed, to perform temporary services, which is also undisputed.

The very incorrectness of respondent's position is demonstrated not only by reference to the statute and the legislative history, but also by the fact that the respondent had a completely different interpretation of the meaning of the statutory language for nearly twenty years before the UArteeE case was decided. In *Matter of Contopoulos*, 10 I & N Dec. 654 (1964), also decided by the immigration and nationality commissioner, the Service described the test as follows:

> The test that must still be met is whether th[e job] function is of a temporary nature or whether it is of such a continuing nature that it cannot be considered temporary . . . *It is the nature of the position which determines whether the job is temporary* . . . [Id. at 657, 658 (emphasis supplied)]

In *Contopoulos*, the respondent concluded that the question was not whether the *petitioner* had an ongoing need for the services that were requested, but focused instead on the job itself and whether it was temporary.

Almost twenty years later, *Artee* overruled *Contopoulos*. In *Artee*, the commissioner noted:

> The nature of the duties to be performed were [sic] controlling [under *Contopoulos*], not the intent of the petitioner and the beneficiary concerning the time that the individual beneficiary would be employed in that position.

> The Service *now* views this interpretation as incorrect. It is not the nature of the duties of the position which must be examined to determine the temporary need. It is the nature of the *need* for the duties to be performed which determines the temporariness of the position . . .
>
> [The machine company's] need to supply machinists to its customers is ongoing. Therefore, as long as this universal shortage of machinists exists, the nature of the need for the position with the petition is such that the duties are not temporary and will persist as long as the shortage. [18 I & N Dec at 367-368 (emphasis supplied)]

Artee articulated no criteria, and referred to no legislative history, in reaching its conclusion that the ongoing need of the petitioner for the services in question was in any way relevant to whether petitions should be granted under Section 101(a)(15)(H)(ii), to the contrary—as the statute contemplates, and as the Service itself acknowledged in the *Contopoulos* decision, which was the service's position for nearly twenty years—the correct focus is on the nature of the duties that are to be performed, and not the need of the petitioner. The duties to be performed in this case are clearly temporary. Petitioners' engineers are performing work on specific projects, pursuant to specific requests by the persons with whom it contracts as the need arises to accommodate peak production demands and retooling needs. Since those services are temporary, petitioners are entitled to have their petitions granted.

There is no conceivable way that respondent could justify its denial of the H-2 visas in issue given this legislative history and this clear expression of congressional intent. There is no dispute that the 91 workers seeking H-2 visas are persons coming to the United States "temporarily" to accommodate "labor shortages" in "periods of intensified production." Since all of the criteria of the statute have been satisfied—and since there can be no real dispute on this issue—the Court's mandate, as the *Chevron* Court explained, is to enforce the clear intent of Congress.

Indeed, both of the parties to the appeal before the Sixth Circuit agreed that the statutory language is unambiguous and that, therefore, the Court's sole function is to "give effect to the unambiguously expressed intent of Congress," 467 US 837, 843 (1984). Thus, in their appeal brief, petitioners recited that "[t]he text of the statute is thus very clear; and this Court's function, in the first instance, is to examine the plain text of the statute to determine its meaning." Even more significantly, respondent—the very agency to whose judgment the Court held in its opinion and order of August 11, 1987 it must defer—itself takes the position that the statute is clear and unambiguous. *See, e.g.*, Appellant's Opening Brief, December 11, 1986, p 20 ("[t]he [District] Court erred because it failed to examine the *plain language of the statute* which reveals that three requirements, in addition to showing that unemployed persons capable of performing such service or labor cannot be found in this country, must be met") (emphasis supplied); Appellant's Opening Brief, p 14 ("[i]t is evident that Congress intended the nature of the need of the employing petitioner to determine the propriety of the importation of a temporary alien worker under Section 101(a)(15)(H)(ii)".)

It would have been one thing for the Court to have invoked the *Chevron* rule if the *agency itself* had taken the position that there was an inherent ambiguity in the statute, or if the agency had taken the position that the statutory scheme contemplated that a considerable amount of discretion was required to be accorded to the agency in interpreting the statute. *But in this case, the agency agrees fully with petitioners that the statute is clear and unambiguous, and that the Court's sole function is to interpret the text of the statute.* Under those circumstances, the Court's conclusion that "the Commissioner's interpretation of H-2 in *Artee* is a plausible reading of the statute in light of its stated goals and objectives. So too was the old standard in *In re Contopoulos*, which Artee overruled" (Opinion and Order, p 10)—is nothing short of perverse; and it is, petitioners respectfully submit, an abdication of the Court's judicial responsibility to enforce the plain terms of a carefully constructed statutory scheme.

CONCLUSION

Because the Court misconstrued the law—in particular, the *Chevron* rule on which it purported to rely in announcing its decision—and because the legislative history of the statute makes clear that petitioners were, as a matter of law, entitled to the relief which they had requested, the petition for writ of certiorari should be granted.

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 86-1629; 86-1550; 86-2054

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SUSSEX ENGINEERING, Ltd.,
Plaintiff-Appellant (86-1629),

v.

JAMES H. MONTGOMERY,
Defendant-Appellee (86-1629).

E & S DESIGN & DEVELOPMENT, Ltd.
and HAWTAL WHITING, S.A.,
Plaintiffs-Appellees
(86-1550/2054),

v.

JAMES H. MONTGOMERY,
Defendant-Appellant.
(86-1550/2054).

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed August 11, 1987

Before: JONES and RYAN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

Sussex Engineering v. *Montgomery* Nos. 86-1629/
1550/2054

JONES, Circuit Judge. These cases involve the Immigration and Naturalization Services's (INS's) interpretation of the standards governing applications for temporary, nonimmigrant visas for foreign automotive design engineers. In 86-1629, plaintiff Sussex Engineering, Ltd. (Sussex) appeals the district court's entry of summary judgment in favor of defendant Montgomery, the district director of the INS, ruling that the agency's final decision denying Sussex's petitions for three temporary worker visas pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act of 1952 (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii) (1982) (H-2 petitions), was not arbitrary and capricious. In 86-1550, defendant Montgomery appeals the district court's order granting summary judgment in favor of plaintiffs, E&S Design & Development, Ltd. (E&S) and Hawtal Whiting S.A. (Hawtal), holding that the agency's final decision denying plaintiffs' 91 H-2 petitions was arbitrary and capricious. In 86-2054, a related case, Montgomery appeals a subsequent order of the district court directing him to grant immediately the 91 H-2 petitions. Because of the common issue regarding the meaning of the statutory term "temporary services or labor," the cases were argued on the same day and are consolidated for opinion.

The General Motors Corporation, like other automotive manufacturers, requires the services of scores of design engineers to work on various, discrete automotive design projects. It is undisputed that there are currently insufficient "qualified" American automotive design engineers to satisfy the demands of the auto companies. The reputed "qualifications" for a senior design engineer are a two-year associate's degree and five to seven years experience as a draftsman. A four-year bachelor's degree allegedly makes an individual "overqualified." For this reason, General Motors has been utilizing English design engineers, employed by specialized temporary service agencies and entering the country on H-2 visas to work pursuant to one-year contracts, since at least 1978. We also note that General Motors initiated a community college program in 1980 to bolster the domestic

pool of qualified labor. The first class of 50 domestic design engineers should become available later this decade.

Sussex

Sussex Engineering is an independent professional design and engineering firm specializing in providing design and engineering personnel under contract to various automotive manufacturers. In May of 1985, Sussex filed three H-2 petitions for temporary worker visas in the Detroit INS office on behalf of three foreign-national automotive design engineers. This was the first time that Sussex ever filed H-2 petitions. These three alien automotive design engineers were to be employees of Sussex, working temporarily at the General Motors Tech Center in Warren, Michigan, designing car body interiors. In August of that year, district director Montgomery denied the petitions on the authority of *In re Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), after finding Sussex's need for the design engineers to be ongoing rather than temporary. Sussex's administrative appeal from this decision was dismissed in November 1985.

The *Sussex* suit was filed December 19, 1985, pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* (1982), alleging that the agency's final decision was arbitrary and capricious. The district court entertained oral argument on cross-motions for summary judgment on June 30, 1986, and rendered an oral opinion granting defendant Montgomery's motion. It ruled that the agency's decision was not arbitrary and capricious despite the fact that one identical petition "slipped through the cracks and was granted" while all the others were denied. "The one which was granted was clearly an oversight and an error." The court also stated that Sussex had a permanent need for design engineers to fulfill its ongoing contracts with General Motors. In support of this finding, the court cited the "permanent cadre" of such engineers maintained by Sussex. The court therefore concluded that the *Sussex* petitions were indistinguishable from those

in *Artee* and likewise inappropriate under H-2. Sussex appeals this judgment, No. 86-1629.

E&S Design

E&S Design and Hawtal Whiting are also engineering firms in the business of providing contract services to the auto companies. E&S and Hawtal have been contracting with General Motors to provide "temporary" English automotive design engineers every year since 1980. In March of 1985, E&S and Hawtal filed numerous H-2 petitions for such English engineers. On August 6, 1985, district director Montgomery denied 91 of those petitions under the authority of the *Artee* case. That very day, five identical petitions submitted by E&S were granted without explanation. Administrative appeals of the 91 denials filed by E&S and Hawtal were dismissed in September 1985.

E&S and Hawtal filed suit later that month.[1] Like the court in *Sussex*, the *E&S* court also heard argument on cross-motions for summary judgment. Unlike *Sussex*, the April 15, 1986 written opinion in *E&S* granted the petitioner-plaintiffs' motion.

The *E&S* opinion stated that even though plaintiffs fell short of satisfying the requirement of temporary services as defined in *Artee*, the district court still found that the defendant's denial of the 91 H-2 petitions was arbitrary and capricious for the following reasons. Initially, the court asserted that the defendant offered no explanation for denying the 91 H-2 petitions while simultaneously granting five others that were indistinguishable. The district court also expressed that the defendant's argument that action on the petitions might have been different had General Motors itself been the petitioning employer, rather than E&S Design and Hawtal, was

[1]Although both *E&S* and *Sussex* were filed in late 1985 in the Eastern District of Michigan, the cases were assigned to different judges.

necessarily erroneous and, in fact, strong evidence of arbitrariness and capriciousness. Finally, the district court noted that the Department of Labor had certified that there was a shortage of qualified domestic automotive design engineers. The court reasoned that H-2 visas were intended to alleviate just these types of deficiencies. Accordingly, the district court entered judgment for plaintiffs and "remanded to the defendant for the granting of the visa applications." Defendant Montgomery appeals this judgment, No. 86-1550.

When the defendant did not grant the 91 visa petitions immediately following remand, plaintiffs filed a motion to enforce the judgment in the district court. This motion was granted on September 2, 1986. The district court's order stated that the original judgment order was unambiguous and the defendant was therefore directed to issue 12-month H-2 visas, to run from the April 15, 1986 judgment. Defendant also appeals this order, claiming that he is powerless under 8 C.F.R. § 214.2(h)(6), (10) & (12) (1987) to grant such visas beyond the April 24, 1986 expiration of the validity of the labor certification, No. 86-2054.

A federal court's review of an INS decision to deny an H-2 petition is limited to the determination of whether the agency's findings and conclusions are arbitrary and capricious, an abuse of discretion, or not in accordance with the law. 5 U.S.C. § 706(2)(a) (1982); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-14 (1971). We engage in plenary review of questions of statutory interpretation. *North American Indus., Inc. v. Feldman*, 722 F.2d 893, 898 (1st Cir. 1983). Nevertheless, "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985).

I.

These cases are first and foremost about whether the INS is properly interpreting the statute providing for nonimmi-

grant, temporary worker visas. *See* 8 U.S.C. § 1101(a)(15)(H)(ii). Before we address that specific section, however, it is necessary to put the statutory scheme into perspective.

Section 214 of the Act, entitled "Admission of nonimmigrants—Regulations," provides:

> (a) The admission to the United States of any alien as a *nonimmigrant* shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . . .
>
> (b) Every alien shall be presumed to be an *immigrant* until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title. . . .
>
> (c) The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

Id. § 1184 (1982 & Supp. III 1985) (emphasis added).

Section 203 of the Act describes the allocation of *immigrant* visas, and lists categories of immigrants in order of preference. The "sixth preference" is for permanent workers:

> (a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas as follows:
>
> . . . .
>
> (6) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a) of this title, to qualified immigrants who are capable of performing specified skilled or unskilled labor, *not of a temporary or seasonal nature*, for which a shortage of employable and willing persons exists in the United States.

Id. § 1153(a)(6) (1982) (emphasis added).

Finally, section 101 of the Act provides for some limited exclusions from the definition of "immigrant." One of those exclusions is the subject of our controversy:

> (a) As used in this chapter—
>
> . . . .
>
> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> . . . .
>
> (H) an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country . . . .

Id. § 1101(a)(15)(H)(ii). This is what is known as the "H-2" exception.[2]

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[2]Section 301(a) of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301(a), 100 Stat. 3411, 3416 (1986), amended

For almost 20 years following *In re Contopoulos*, 10 I&N Dec. 654 (1964), the INS interpreted H-2 to require that "both the coming to the United States and the performance of service or labor must be temporary, the term 'temporary' being used twice." *Id.* at 657. Under *Contopoulos*, the INS determined temporariness by looking to the nature of the duties performed, not to the intent of the petitioner employer and the alien beneficiary concerning the time that the alien beneficiary would be employed in that position. This interpretation of "temporary services" was changed in *In re Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

In the *Artee* case, the petitioner was a "temporary help" service catering to technically-oriented firms. Explicitly abandoning as incorrect the *Contopoulos* standard, the Commissioner stated that: "It is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position." *Id.* at 367. Under the new *Artee* standard, the question in the instant case is: Can the petitioner employment agencies credibly establish that they have not employed automotive design engineers in the past and will not need the services of such engineers in the near, definable future? *See id.*

H-2 to provide a new classification known as "H-2A" for alien agricultural workers:

> Paragraph (15)(H) of section 101(a) (8 U.S.C. 1101(a)) is amended by striking out "to perform temporary services or labor," in clause (ii) and inserting in lieu thereof "(a) to perform agricultural labor or services, . . . of a temporary or seasonal nature, or (b) to perform other temporary service or labor".

Pursuant to section 301(d) of the 1986 Act, this amendment of H-2 only applies to petitions or applications filed on or after June 1, 1987. Nevertheless, the standards for what we refer to in this opinion as H-2 (corresponding to the amended H-2B) were not materially affected by the 1986 Act insofar as they apply to the petitions in the case at bar.

Because the focus is on the need of the petitioning employer, the Commissioner observed that a temporary employment agency does not have a temporary need where it maintains a "permanent cadre" of a specific type of worker to satisfy the fluctuating needs of various clients for such workers, even though any individual client may have only a temporary need. *See id.* at 367-68.

Plaintiff in *Sussex* argues that its situation is distinguishable from that of *Artee* because Sussex does not maintain a "permanent cadre" of alien design engineers in its employ, and in fact this is the first time Sussex has ever requested H-2 temporary worker visas. Sussex does admit, however, that it has a permanent contingent of domestic engineers in its employ that it regularly contracts out to the auto companies. We view the residency of the individual employees that compose the permanent cadre as irrelevant to the question of the temporary employment agency's need for a specific type of worker. Thus, we are not persuaded by Sussex's attempt to distinguish *Artee*.

Plaintiffs in both cases challenge *Artee* as an erroneous interpretation of the statute. All parties agree that to succeed under H-2, the petitioner must establish four statutory requirements: (1) that the alien beneficiary of the petition has a residence in a foreign country which he has no intention of abandoning; (2) that the beneficiary will be coming temporarily to the United States; (3) that the beneficiary will perform temporary services or labor; and (4) that unemployed persons capable of performing such services or labor cannot be found in this country. *See In re General Dynamics Corp.*, 13 I&N Dec. 23, 25 (1968). The first, second and fourth prongs are not disputed. The INS, in *Artee*, revised the standards for establishing prong three, referring to the temporary nature of the services or labor. The INS now interprets the third requirement to mean that the need of the petitioner-employer for the alien beneficiary, or other workers with similar skills, will not be ongoing or recurring.

The relevant language of H-2, requiring that the alien beneficiary be "coming temporarily to the United States to perform temporary services or labor," has remained essentially unchanged since its enactment in 1952.[3] The legislative history of section 101(a)(15)(H) of the 1952 Act provides in pertinent part:

> The question of importing any alien as a nonimmigrant in this class is to be determined by the Attorney General as prescribed in section 214(c) [8 U.S.C. § 1184(c)] which sets forth a petition procedure. These provisions of the bill grant the Attorney General sufficient authority to admit temporarily certain alien workers, industrial, agricultural, or otherwise, for the purpose of alleviating labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production.

H.R. Rep. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1698. We do not consider this brief passage to provide a definitive answer to the question *sub judice*. We read this history to reflect the congressional intent to enact only the basic statutory framework, and to leave the details—such as the operating definition of the term "temporary services or labor"—to be filled in by the administrative process.

In our opinion, the Commissioner's interpretation of H-2 in *Artee* is a plausible reading of the statute in light of its stated goals and objectives.[4] So too was the old standard in *In re Contopoulos*, which *Artee* overruled. We cannot say that

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[3]*See supra* note 2.

[4]We note that the three federal courts which have discussed *Artee* have accepted its newly-announced interpretation of H-2 as correct. *See North American Indus., Inc. v. Feldman*, 722 F.2d 893, 900-01 (1st Cir. 1983); *Volt Tech. Serv. Corp. v. INS*, 648 F. Supp. 587 (S.D.N.Y 1986); *Wilson v. Smith*, 587 F. Supp. 470 (D.D.C. 1984).

either standard is a more clearly correct interpretation of the statute than the other. Certainly the *Artee* standard is reasonable and it cannot be said to conflict with the expressed intent of Congress. This is exactly the type of situation where the court should defer to the statutory construction of the agency charged with that statute's administration. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.11 (1984).

We rule that defendant Montgomery's action in rejecting the instant H-2 petitions was in accordance with the law.

II.

Turning to the question of whether the district director acted arbitrarily and capriciously in denying these petitions, we address specifically the three grounds cited by the *E&S* court in its opinion. Essentially the same grounds are argued by the plaintiff-appellant in *Sussex*. First, the *E&S* court stated that defendant Montgomery offered no explanation for granting five H-2 petitions while, at the same time, denying 91 others. The statement is in error. The administrative record reveals that the inconsistent action on the five petitions was due to simple agency oversight, and defendant's answer stated that action had been taken to revoke the five petitions erroneously granted. It is absurd to suggest that the INS or any agency must treat acknowledged errors as binding precedent.

Second, the *E&S* court was very much disturbed by the suggestion that the agency decision *might* have been different had General Motors itself been the petitioner, rather than the temporary employment services. The court stated that the standard should be the same regardless of the identity of the petitioner, and that such a suggestion evidenced the defendant's arbitrariness. We think the district court overreacted. The *Artee* standard looks to the "needs" of the petitioner, not the petitioner's clients. As the Commissioner explained in *Artee*, there could conceivably be a difference

between the two. As a practical matter, however, there would not have been a difference in the instant case since General Motors' need was just as continuous and ongoing as the plaintiffs'.

Finally, the *E&S* court observed that the Department of Labor had certified that there was a bona-fide shortage of domestic design engineers. This is well and good, but it only satisfies one of the four prongs of the statute. If the services are not temporary, even a *severe* labor shortage will not justify granting an H-2 petition. The statutory scheme of the immigration laws plainly anticipates that domestic labor shortages of a nontemporary or permanent nature should be alleviated by means of the "sixth preference" of section 203 of the Act, 8 U.S.C. § 1153(a)(6). *See Volt*, 648 F. Supp. at 580-81. *Compare* 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 2.14a(2) (discussing H-2 category) *with id.* § 2.27(g) (discussing sixth preference).

For these reasons, we rule that defendant Montgomery did not act arbitrarily and capriciously or in abuse of his discretion in denying the instant petitions.

III.

Because we determine that the district court's judgment in the *E&S* case must be reversed, there is no need for us to pass on the merits of the court's post-judgment implementation order of September 2, 1986. That order is summarily vacated.

In accordance with the foregoing discussion, the judgment in *Sussex*, No. 86-1629, in favor of the defendant Montgomery is **AFFIRMED.** The judgment in *E&S Design*, No. 86-1550, in favor of the petitioning employers is **REVERSED.** The post-judgment implementation order in *E&S Design*, No. 86-2054, is **VACATED.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E&S DESIGN AND DEVELOPMENT LTD., et al.,

Plaintiffs,

JAMES MONTGOMERY, District Director, United States Department of Justice, Immigration and Naturalization Service,

Defendant.

Civil No. 85CV74500DT

Hon. Robert E. DeMascio

MEMORANDUM AND ORDER

MEMORANDUM AND ORDER

E&S Design and Development, Ltd. and Hawtal Whiting S.A. (E&S or plaintiffs) are foreign corporations whose employees perform automobile engineering and design services for several internationally known companies. In early 1985, plaintiffs began applying for "H-2" visas, pursuant to 8 U.S.C. §1101(a)(15)(H)(ii), for 91 automobile design engineers from Great Britain to perform work on the 1989 model year at the General Motors Technical Center in Warren, Michigan.

On August 6, 1985, the Immigration and Naturalization Service (the defendant) denied the applications and plaintiffs appealed to the defendant administrative appeal unit. On September 12, 1985, the appeal was dismissed. Plaintiffs then commenced this action as an appeal from the adverse decision. Presently before the court are the parties' cross motions for summary judgment.

The relevant facts are not in dispute. For every model year since 1978, General Motors has employed non-domestic workers to perform engineering design services. Plaintiffs have described the services of these employees as "provid[ing] European styling" and "design[ing] interior trim, seating, underframes and doors." Brief of petitioner at p. 7 (August 22, 1985), found at p.88 of the administrative transcript. The United States Department of Labor has certified that there is a bona fide shortage of domestic laborers to perform these services. Workers performing design services generally possess two-year associate degrees and begin work as draftsmen. After five to seven years on the job, draftsmen have the requisite experience to become designers. Consequently, an individual with a four-year engineering degree from a domestic university would ordinarily be overqualified for a designer position.

Plaintiffs represent that the necessary curricula and training programs for automobile design engineers are being established in the United States; however, there will be a "lag time" before students will be qualified to perform the necessary services. E&S estimates that there will not be an ade-

quate supply of domestic design engineers until 1988 or 1989. The court is further apprised that, contemporaneous to the denial of these 91 applications, the defendant granted H-2 visas to some five other foreign employees to perform similar design services at the General Motors Fisher Body Plant.

In determining whether the defendant properly denied these applications, we begin by examining the relevant statute, 8 U.S.C. §1101(a)(15)(H)(ii). This sections provides, in pertinent part:

> The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—an alien having a residence in a foreign country which he has no intention of abandoning (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such services or labor cannot be found in the country . . .

Interpretation of the phrase "to perform temporary services of labor" is critical as the primary factual error asserted by plaintiffs is defendant's finding that General Motors' need for design engineering services was not temporary in nature. In making this finding, the defendant relied on *In Re Arte Corp.*, 18 I & N Dec. 366 (Comm. 1982). In *Artee*, the petitioner corporation was in the business of providing temporary help to technically oriented firms. The defendant held that, in order to qualify foreign workers for H-2 status, the domestic *need* for the services, rather than the services themselves, must be temporary in nature:

> [T]he primary question becomes: "Can Artee establish that they have not employed machinists in the past and will not need the services of machinists in the near, definable future?" . . . There is currently a widespread shortage of skilled machinists in the United States. Because of this shortage, the petitioner, as a prudent business measure, has ensured that it can supply machinists to its customers. Its need to supply machinists to its customers

> is ongoing. Therefore, as long as this universal shortage of machinists exists, the nature of the need for the position with the petitioner is such that the duties are not temporary and will persist as long as the shortage.

Id. at 367-68.

In *Artee*, the Immigration and Naturalization Service promulgated this new statutory interpretation and specifically rejected the prior standard set forth *In re Contopoulos*, 10 I & N Dec. 654 1964):

> The test . . . is whether the [job] function is of a temporary nature or whether it is of such a continuing nature that it cannot be considered temporary . . . It is the nature of the position which determines whether the job is temporary.

Id. at 657-58.

Under the *Artee* standard, General Motors' need for design engineering services is temporary only in the sense that it is cyclical, occurring from one model year to the next. The domestic automaker has experienced a "temporary" need for designers for at least the last 11 models years and will experience a similar need in the future. Even though plaintiffs fall short of satisfying this aspect of the *Artee* standard, we conclude that defendant acted arbitrarily in denying these applications. There are three primary reasons for our conclusion.

Initially, the defendant offers no explanation for granting H-2 permits to five design engineers assigned to the General Motors Fisher Body Plant while denying the applications for these 91 workers. Surely, if there were some difference between those five applications and these 91, defendant would have so apprised the court. Secondly, in its supplemental memorandum filed December 5, 1985, the defendant curiously suggests that the applications might have been granted had General Motors been the petitioning party rather than plaintiffs. Regardless of whether the petitioner is the domestic company in need of the services or a foreign corporation whose employees stand ready to perform such services, the consideration

given the applications is necessarily the same. This suggestion by the defendant strongly supports our conclusion that the denial of the applications was arbitrary and improper. Finally, the United States Department of Labor has certified that there is a bona fide shortage of domestic workers available to perform these services. By virtue of the plain language of the statute, this is the type of deficiency that H-2 visas were intended to correct.

To the extent that General Motors is not engaging in an intense effort to cultivate the necessary educational and training programs in the United States, we understand the defendant's reluctance to allow the automaker to continue utilizing foreign designers on an ongoing, albeit cyclical, basis. Therefore, although the court finds defendant's decision arbitrary and improper on this occasion, the defendant may appropriately expect that General Motors' need for foreign designers will soon be alleviated and, ultimately, eliminated by effective domestic educational and training programs.

Accordingly, defendant's motion for summary judgment will be denied and plaintiff's motion for summary judgment will be granted, and this cause of action remanded to defendant for the granting of the visa applications.

IT IS SO ORDERED.

Robert E. DeMascio
United States District Judge

Dated: April 15, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E&S DESIGN AND DEVELOPMENT LTD., et al.,

Plaintiffs,

v.

JAMES MONTGOMERY, District Director, United States Department of Justice, Immigration and Naturalization Service,

Defendant.

Civil No. 85CV74500DT

Hon. Robert E. DeMascio

JUDGMENT

This cause having come before the court on cross motions for summary judgment, and the court having filed its Memorandum and Order,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that defendant's motion for summary judgment be and the same hereby is DENIED;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' motion for summary judgment be and the same hereby is GRANTED and this cause of action is hereby REMANDED to defendant for the granting of the visa applications.

Dated at Detroit, Michigan, this 15th day of April 1986.

Robert E. DeMascio
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E&S DESIGN AND DEVELOPMENT LTD., et al.,

Plaintiffs,

v.

JAMES MONTGOMERY, District Director, United States Department of Justice, Immigration and Naturalization Service,

Defendant.

Civil No. 85CV74500DT

Hon. Robert E. DeMascio

ORDER

This matter is before the court on plaintiff's motion for enforcement of this court's April 15, 1986 summary judgment order. Plaintiffs filed this complaint in September 1985 seeking to compel defendant to issue H-2 visas to 91 automobile design engineers to work at the General Motors Technical Center in Warren, Michigan. This court granted plaintiffs' motion for summary judgment and denied defendant's cross-motions on April 15, 1986. Specifically, the court ordered the cause of action "remanded to defendant for the granting of the visa applications."

This court's order was not ambiguous. Defendant was directed to grant the 91 visas for which plaintiffs applied. If plaintiffs applied for 12-month visas, 12-month visas should have been granted. The 12 months began to run on the date of this court's order, not on the date of application.

NOW, THEREFORE, IT IS ORDERED that plaintiffs' motion to enforce the summary judgment order be and the same hereby is GRANTED;

IT IS FURTHER ORDERED that defendant shall grant the visas for the length of time specified in the application.

Robert E. DeMascio
United States District Judge

Dated: September 2, 1986

No. 86-1550/2054

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

E&S DESIGN &
DEVELOPMENT., LTD.,
AND HAWTAL WHITING, S.A.,

Plaintiffs-Appellees, ORDER

v.

JAMES H. MONTGOMERY,

Defendant-Appellant

BEFORE: JONES and RYAN, Circuit Judges, and
CELEBREZZE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk